

assessee u/S. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the tax periods from 01.04.2008 to 31.08.2010.

2. The facts leading to this appeal, in brief, are as follows:-

The dealer-assessee in the instant case runs a hotel named and styled as "M/s. Mayfair Hotels & Resorts (P) Ltd., Bhubaneswar". The dealer runs the business of selling cooked food prepared by it. The business establishment of dealer-assessee was originally assessed u/S. 39 of the OVAT Act on the basis of self-assessment and its returned turnover was accepted by the assessing officer for the relevant periods. However, on receipt of a Fraud Case Report (FCR) against the dealer from the Enforcement Range, Bhubaneswar later on which revealed unauthorized claim of Input Tax Credit (ITC) by the dealer, the case against it (the dealer) was reopened u/S. 43 of the OVAT Act on the allegation of tax evasion. Accordingly a statutory notice was served on the dealer for production of books of account before the authority concerned in order to ascertain the correctness and genuineness of the tax compliance by the assessee. In course of further assessment the assessing officer examined the books of account of the dealer and confronted the allegations made against it in the FCR. Statement given on behalf of the dealer was also recorded and it came to light that the dealer being a hotelier had availed ITC on

fuel (cooking gas) which is not admissible as cooking gas was not used as raw material as envisaged u/S. 20 of the OVAT Act. Thus the assessing officer calculated the ITC availed by the dealer on purchase of cooking gas for the periods from 01.04.2008 to 31.08.2010 and imposed tax thereon @ 12.5% which came to `4,22,266.00. He also imposed a penalty of `8,44,532.00 i.e. twice the amount of tax assessed and then issued a demand notice of `12,66,798.00 against it.

Being aggrieved with the aforesaid order the dealer-assessee preferred an appeal before the first appellate authority. It was contended on behalf of the dealer before the first appellate authority that the demand was raised on the ground of its availing ITC on gas/fuel. The said gas/fuel is a necessary ingredient for preparation of finished product i.e. cooked food. The dealer had pleaded before the assessing officer that the gas/fuel used by it should be treated as raw material but the assessing officer termed the same as consumable and disallowed the ITC availed by it. It was also argued on behalf of the dealer-assessee that determination of its tax liability alongwith penalty was very high and illegal and further the principle of natural justice was not followed by the assessing officer in course of disposal of this matter. Learned Advocate who was appearing on behalf of the dealer-assessee before the first appellate authority also cited a decision rendered by the

Hon'ble High Court of Orissa in the case of Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax and others, reported in [2008] 15 VST 228 (Ori.) wherein it is held that ITC on consumables (fuel) is to be allowed and the same is deductible from the tax demand. The first appellate authority considering all the materials placed before him came to a conclusion that the order of the assessing officer disallowing the claim of ITC on purchase of cooking gas/fuel is not legally sustainable and accordingly he quashed the same with a direction that excess payment, if any, made by the dealer-assessee be refunded to it as per the provisions of law.

3. The State being aggrieved with this order of the first appellate authority preferred this appeal on the grounds that as per Sec. 20(3) of the OVAT Act specific conditions are there in which ITC can be availed. The fuel/gas never goes into the composition of cooked food i.e. the finished product of the dealer-assessee but it had claimed ITC on purchase of fuel/gas used for cooking of the food. The assessing officer disallowed the claim of ITC on the ground that fuel and gas used for cooking food are not raw materials and as such raised the tax demand. The first appellate authority failed to consider the provisions of OVAT Act and allowed the ITC in favour of the dealer which is illegal being contrary to the statutory provisions of law and as such has to be set aside.

The dealer-assessee has filed cross-objection in this appeal supporting the order passed by the first appellate authority.

4. In course of hearing learned Counsel appearing on behalf of the State submitted that Sec. 2(25) of the OVAT Act defines what can be termed as 'input'. Sec. 20(3) of the OVAT Act provides that ITC shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods for the purposes as described in the sub-sections (a) to (e) with provisos (a) to (d) mentioned therein. As per Sec. 20(3)(b) of the OVAT Act envisages input tax shall be allowed for purchases made within the State from registered dealer holding a valid certificate of registration in respect of goods which are used as inputs or capital goods in the manufacturing of goods within the State, other than those specified in Schedule A and Schedule C and Schedule D for sale. For availing ITC the specific goods must come under the definition of 'input' as provided u/S. 2(25) of the OVAT Act which describes 'input' means any goods purchased by a dealer in the course of his business for resale or use in the execution of works contract, in processing or manufacturing, where such goods directly goes into composition of finished products or packing of goods for sale and includes consumables directly used in such processing or manufacturing. Thus fuel and gas do not form an integral part of the cooked food and further cannot be taken as

consumables directly used in the processing or manufacturing of cooked food. He also cited decision of the Hon'ble Apex Court rendered in the case of Dy. Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Thomas Stephen & Co. Ltd., reported in [1988] 69 STC 320 (SC) wherein it was held that cashew shells which had been used as fuel in the kiln of the dealer since did not get transformed into the end product and were not used as raw material in the manufacture of goods i.e. tiles, terracotta woks and ceramics and used only as an end in the manufacture of the goods by the dealer-assessee could not be taken as raw material. It is further submitted by the learned Addl. Standing Counsel (CT) that in the said decision Hon'ble Apex Court also decided what can be termed as 'consumption' in a manufacturing process. According to the above decision of Hon'ble Apex Court 'consumption' as contemplated by Sec. 5A(1)(a) of Kerala General Sales Tax Act (15 of 1963) must be in the manufacture as raw material or all other components which go into the making of the end product. Goods used for ancillary purpose, like fuel, in the process of manufacture, do not fall within Sec. 5A(1)(a).

5. Learned Counsel appearing on behalf of the dealer-assessee, however, did not agree with such interpretation of consumables by the learned Addl. Standing Counsel (CT) in the instant case and submitted that 'consumables' as included in the definition of

'input' provided in the OVAT Act has been clearly defined in the case rendered by the Hon'ble High Court of Orissa in the case of Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax & others, reported in [2008] 15 VST 228 (Ori.). In the said case it has been clearly held that-

Quote : "The expression "consumable" has not been defined in the OVAT Act. In the absence of any such statutory definition the expression has to be understood in the meaning assigned to it by various dictionaries and how it is understood in trade and commerce. "Consumable", according to Webster Dictionary means that which can be consumed, a consumable commodity. "Consume" means to eat, use up, and destroy. According to Shorter Oxford Dictionary "consumable" means capable of being consumed by fire. The term "fuel" according to Webster Dictionary means any material as coal, oil, gas, wood etc. Which is burnt to supply heat or power. According to Shorter Oxford Dictionary "fuel" means material for burning combustible matter for fires." Unquote.

In the above case a question came up as to whether furnace oil which was allegedly not a consumable directly used in the manufacturing process but was used as a fuel for burning is to be considered as a goods inviting allowance of ITC. Hon'ble Court while relying on various decisions of Hon'ble Apex Court and Hon'ble High Courts of other States held that furnace oil is nothing but an input and

tax paid on purchase of such input shall qualify for set off against the output tax. For better appreciation we would like to quote paragraph-31 of the above judgment here.

Quote : "Now it is to be examined whether Section 2(25) requires that furnace oil, in order to be treated as input, should directly go into the composition of finished product. In the definition of "input" under Section 2(25), the Legislature has included various types of articles. "Input" has been defined to mean any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where, such goods directly goes into composition of finished products and includes consumables directly used in such processing or manufacturing. It will appear therefore that the definition of "input" comprises four different types of articles, viz. articles or goods for resale, goods used in the execution of works contract, goods used in processing or manufacturing, where such goods directly go into composition of finished products and consumables directly used in such processing or manufacturing. Separately, by an inclusive definition, consumables which are directly used in such processing or manufacturing have been included. Therefore, the inclusive definition does not refer to any goods which must be used in processing or manufacturing, where such goods directly go into composition of finished products. As per inclusive definition, the only requirement is that the consumables are directly used in such processing or manufacturing. "Consumables" need not be required to directly go into

composition of finished products. The very expression "consumables" postulates that such articles are destroyed or used upon the processing or manufacturing of goods. It is because of this reason that while consumables by an inclusive definition are included in the definition of "input" under Section 2(25) of the VAT Act, the Legislature did not insist upon the requirement which appears in the earlier clauses that such goods must go into composition of finished products. When the Legislature does not insist upon such requirement, the insistence by opposite party No.1 that consumables must go directly into composition of finished product is totally misconceived and runs contrary to the very definition of "input" under Section 2(25) of the VAT Act." Unquote.

6. In the instant case the assessing officer in his order opined that as the cooking gas used as consumable for manufacturing of cooked food and such goods (i.e. cooking gas) does not go into the composition of finished product i.e. the cooked food, the contention of the dealer that cooking gas as a raw material is baseless and not factually correct and, therefore, ITC is not admissible u/S. 20(3)(b) of the OVAT Act. Learned first appellate authority, however, did not agree with the findings of the assessing officer on this score and while relying upon the decision rendered by the Hon'ble Court in the case of Reliance Industries Ltd. (supra) held that in the present case the orders of the

Assessing Authority disallowing the claim of ITC on purchase of cooking gas/fuel is not legally sustainable.

In another case rendered by the Hon'ble High Court of Orissa in the case of Odisha Power Generation Corporation Ltd. Vs. State of Odisha and Another, reported in [2015] 81 VST 138 (Orissa) almost in a similar situation coal was held as a raw material for the purpose of generating electricity though that coal does not go directly into the composition of finished product i.e. electricity.

7. The facts and circumstances of the case which has been cited by the learned Addl. Standing Counsel (CT) for the State relate to a different context. The present case is found to be different in a way that without use of fire, to be generated by any means, the process of cooking cannot be started or done. Therefore, in our view fuel in any form such as firewood, cooking gas or even heat generated with the aid of charcoal or electricity when used in the process of cooking food or in preparing and manufacturing of cooked food can be regarded as a consumable and brought within the definition of 'input' as envisaged under Sec. 2(25) of the OVAT Act.

8. In the instant case the dealer generated the fire by using cooking gas and in its registration certificate also which was issued by the Registering Authority, D.C.S.T., Bhubaneswar III Circle, Coal and Liquefied Petroleum Gas (LPG) as well as Charcoal have been

described as consumables. This itself reveals that the dealer used LPG as a consumable in the process of its preparing cooked food and, therefore, he is certainly entitled to avail ITC on purchase of this consumable i.e. cooking gas in course of its regular business.

9. In the circumstances, as discussed in the foregoing paragraphs, we find no infirmity in the order passed by the first appellate authority inviting interference by this Tribunal. In the result, the order passed by the first appellate authority is hereby confirmed and the appeal is dismissed.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
1st Judicial Member

I agree,

Sd/-
(Ranjit Kumar Rout)
Accounts Member-II